92-41

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARBY'S, INC. and FRED BARTLIFF,
Petitioners,

v.

KITCHENS FOODS, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of punitive damages violates the Due Process Clause when liability is dependent on the retroactive application of a new legal standard to prior conduct.

2. Whether the lack of any post-verdict review of the reasonableness of a punitive damage award violates the Due Process Clause.

PARTIES TO THE PROCEEDING

Petitioners in this Court are Arby's, Inc.[1] and Fred Bartliff.

Respondents in this Court are Kitchens Foods, Inc.,[2] Doyle D. Kitchens, Pauline M. Kitchens, Blakely M. Kitchens and Morgan D. Kitchens.

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[1] Arby's, Inc. is a wholly-owned subsidiary of Royal Crown Corporation, which is a wholly-owned subsidiary of Chesapeake Insurance Company, which is controlled by DWG, Inc., a publicly traded company.

[2] Kitchens Foods, Inc. has no parent or subsidiary companies.

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ARBY'S, INC. and FRED BARTLIFF,
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PETITION FOR A WRIT OF CERTIORARI

Arby's, Inc. and Fred Bartliff respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this action.

ORDERS BELOW

The Order and Judgment of the United States District Court for the Southern District of Alabama (App. at 2a-9a) are unreported. The Order of the United States District Court for the Southern District of Alabama denying Petitioners' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and Judgment (App. at 13a-16a) are unreported. The Court of Appeals for the Eleventh Circuit affirmed the Order and Judgment of the District Court (App. at 1a) without opinion, and denied Petitioners' Suggestion for

Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a) without opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 19, 1991 (App. at 1a). On June 5, 1992, the Court of Appeals denied Petitioners' timely Suggestion for Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment Due Process Clause provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. The Fourteenth Amendment Due Process Clause provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

3. Article I, section 9, clause 3 of the Constitution provides: "No . . . ex post facto Law shall be passed."

4. Article I, section 10, clause 1 of the Constitution provides: "No State shall . . . pass any . . . ex post facto Law."

STATEMENT OF THE CASE

A. Statement Of Facts

In late 1984 or early 1985, Respondents became interested in opening a fast food restaurant in Gulf Shores, Alabama. Because there already was a fast food hamburger restaurant in Gulf Shores, Respondents decided that they wanted to open a roast beef restaurant. Accordingly, Respondents contacted the headquarters of Arby's, Inc., a national franchisor. Upon learning of Respondents' interest, Arby's instituted its standard proce-

dures for dealing with prospective licensees, including sending Arby's Uniform Franchise Offering Circular. That Circular contained information pertinent to Respondents' investment decision.

On May 20, 1985, an Arby's Regional Franchise Manager, Fred Bartliff, traveled to Gulf Shores to meet with Respondents. Three of the individual Respondents testified that during this visit Bartliff made projections as to the annual sales volume ($1,000,000) and profits (10-18%) that could be expected if Respondents built and opened a restaurant at a particular site in Gulf Shores. These Respondents also testified that Bartliff repeated these projections on May 30, 1985 in a conversation in Atlanta.

Respondents opened their restaurant in Gulf Shores on November 11, 1985. They operated the restaurant for a period of several years and then abandoned the restaurant on May 4, 1989.

Respondents filed this civil action in the Circuit Court of Mobile County on July 29, 1988. In their Complaint, Respondents alleged fraud, fraudulent suppression, and conspiracy on the part of Petitioners Arby's and Bartliff, and certain other persons and entities not parties to this Petition. The case was removed to the United States District Court for the Southern District of Alabama, Southern Division, based on federal diversity jurisdiction under 28 U.S.C. § 1332.

Near the end of the discovery period, the Court granted summary judgment in favor of Arby's and Bartliff on Respondents' conspiracy claim. The Court also granted summary judgment as to certain aspects of the claims for fraud and suppression. The case proceeded to trial on June 19, 1990 on the basis of the remaining claims in the Complaint and a September 1, 1989 Joint Pretrial Statement setting forth the contentions of the parties. The jury returned a verdict on special interrogatories in

favor of Respondents, assessing $383,000 in compensatory damages and $1,500,000 in punitive damages (App. at 2a-9a). Arby's and Bartliff's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial was denied (App. at 13a-15a) and judgment was entered on October 30, 1990 (App. at 16a).

Petitioners filed an appeal with the United States Court of Appeals for the Eleventh Circuit. The principal issues on appeal were whether (1) the action was timely filed, (2) the representations alleged were actionable under Alabama law, (3) the admission of certain deposition testimony was proper, and (4) the award of punitive damages was consistent with due process. Argument was heard on September 11, 1991 by Circuit Judge Anderson, Senior Circuit Judge Clark, and Senior District Judge Brown. In an unpublished, *per curiam* decision dated September 19, 1991, the panel affirmed the judgment of the District Court without opinion (App. at 1a).

Petitioners filed a Suggestion for Rehearing *En Banc* and Petition for Rehearing seeking rehearing of whether the imposition of punishment (through an award of punitive damages) is permissible under the Due Process Clause where the conduct punished was not actionable at the time it occurred. Although the Court of Appeals ordered additional briefing on the issue (App. at 12a), it denied Petitioners' Suggestion for Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a) without opinion.

B. Presentation Of The Due Process Issue

At all stages of the proceedings below, Petitioners asserted that the imposition of punitive damages violated due process. Petitioners consistently maintained a due process objection to any award of punitive damages before both the District Court and the Court of Appeals. In addition, after the change in Alabama fraud law

became apparent, *see infra* at 7-8, Petitioners argued at their earliest opportunity—before the Court of Appeals—that the award of punitive damages based on the retroactive application of new legal standards was inconsistent with due process. Thus, both of the questions presented in this Petition are properly before the Court. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981).[1]

REASONS FOR GRANTING THE PETITION

I. RETROACTIVE IMPOSITION OF PUNITIVE DAMAGES

A. This Case Squarely Raises The Constitutionality Of Retroactive Imposition Of Punitive Damages

Respondents tried their fraud claim in the District Court solely on the basis of Bartliff's alleged projections concerning future sales and profits at a hypothetical restaurant that had not yet been built.[2] Thus, the claimed representations necessarily were opinions concerning uncertain future events. This was confirmed explicitly by Respondent Doyle Kitchens' trial testimony:

> Q: . . . let's focus first on the claim about a million dollars in sales. Are you with me?
>
> A: Yes, sir.

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[1] Although the emphasis of Petitioners' due process argument changed in recognition of intervening developments in Alabama law since trial, this "mere enlargement" does not change the fact that the question of whether the award of punitive damages is consistent with due process is properly before the Court. *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring).

[2] Respondents' fraudulent suppression claim cannot support the verdict because Respondents' admissions at trial plainly established that any "suppression" claim was time barred (App. at 17a-19a).

Q: Assuming that was said when Mr. Bartliff was there in Gulf Shores, obviously the restaurant wasn't opened; right?

A: No.

* * *

Q: And so what level of sales there might or might not be on that vacant lot was—if it was said—was a projection about future events and what they might turn out to be; right?

A: Right.

Q: *And what was said, if it was said, was Mr. Bartliff's opinion about how things might turn out in the future; right?*

A: *That's correct.*

Q: *Now, because nobody can see into the future, you understood that was Mr. Bartliff's best assessment, his best guess about what might happen; right?*

A: *Yes, sir.*

* * *

Q: On your testimony, the only representation of profits, as I understand it, was that if there were a million dollars in sales at the restaurant, then there would be 10 to 18 percent profit; is that your claim?

A: Yes, sir.

* * *

Q: *And what it was, if it was made, was Mr. Bartliff's opinion about future events; right?*

A: *Right.*

Q: So what it . . . was Mr. Bartliff's—if it was said—and that's the assumption I'm basing all these questions—*if it was said, it was Mr. Bartliff's best assessment, his best guess, about what the future might hold at the location; right?*

A: *That's correct.*

(App. at 21a-22a) (emphasis added).

Respondent Morgan Kitchens also confirmed in his testimony that the alleged representations were, at most, opinions as to unknown future events (App. at 20a). Thus, the actionability of Respondents' fraud claim turned on whether opinions are actionable under Alabama law.

In 1985, when the representations at issue are alleged to have been made, the law in Alabama was clear that to be actionable, a misrepresentation was required to concern a material existing fact. The Alabama Supreme Court stated explicitly in 1984 that "[i]t is axiomatic that mere statements of opinion are not material facts upon which actions for legal fraud can be maintained." *Jones v. McGuffin*, 454 So. 2d 509, 512 (Ala. 1984). Several 1985 Alabama Supreme Court decisions explicitly confirmed this requirement. *See, e.g., Bank of Red Bay v. King*, 482 So. 2d 274, 281 (Ala. 1985) (representation must concern "material existing fact"); *Taylor v. Moorman Mfg. Co.*, 475 So. 2d 1187, 1189 (Ala. 1985) ("material existing fact" an element of fraud). This requirement was longstanding in Alabama law. *See Sly v. First Nat'l Bank*, 387 So. 2d 198, 200 (Ala. 1980) ("We have ruled consistently that an actionable misrepresentation must be of a present fact.").[3]

Thus, as of May 1985, when the representations are alleged to have occurred, allegedly false representations concerning future events could not support a claim for fraud under Alabama law. This longstanding rule was reconfirmed in subsequent decisions. *See, e.g., Lawson v. Cagle*, 504 So. 2d 226, 227-28 (Ala. 1987) (conditional prediction of attorney not a representation of existing material fact).

It was not until long after the events at issue in this litigation that the Alabama Supreme Court began to modify its prior holdings that fraud cannot be based on

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[3] The only recognized exception to this rule at the time was "promissory fraud," which was not alleged in this action. *See P&S Business, Inc. v. South Cent. Bell Tel. Co.*, 466 So. 2d 928, 930 (Ala. 1985) (stating elements of claim for promissory fraud).

opinion. In its 1988 decision in *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988), the Alabama Supreme Court first suggested that a fraud claim could be based on an opinion. However, a year later, the Court seemingly reaffirmed its traditional rule, again holding explicitly and without qualification that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). Despite this clear statement, the court in September 1990 again reversed itself; relying on *Reynolds* and without reference to *Keller*, the court upheld judgments in fraud actions explicitly based on opinions. *Rodopoulos v. Sam Piki Enter., Inc.*, 570 So. 2d 661 (Ala. 1990), *modified*, 1990 Ala. LEXIS 955 (Ala. 1990); *Fraser v. Reynolds*, 588 So. 2d 442, 445 (Ala. 1990), *subsequent appeal*, 588 So. 2d 448 (Ala. 1991). Comparison of the language in these decisions with the pre-1985 decisions cited *supra* starkly reveals the change in Alabama law since the representations at issue allegedly were made.

B. Retroactive Imposition Of Punitive Damages Violates Due Process

As this Court explained only last year, "under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence. They have been described as quasi-criminal." *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991) (citation omitted). The conduct in this case that was punished by the award of punitive damages was not actionable at all in 1985, when it occurred; it is actionable today *only* because of the subsequent expansion by the Alabama Supreme Court of the scope of fraud liability. While the Alabama Supreme Court may have the authority to expand fraud liability and the availability of civil compensatory relief for state law torts, neither Alabama courts nor federal courts can, consistent with federal constitutional principles, retroactively impose quasi-criminal punishment.

As this Court has held several times:

> [A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Giaccio v. State*, 382 U.S. 399, 402-03 (1966). Here the standard under which Petitioners were found liable and required to pay $1,500,000 in punitive damages was not merely vague, it was non-existent at the time of the conduct in question.

Because the retroactive application of legal standards cannot provide adequate notice, retroactive lawmaking is constitutionally disfavored. The Constitution expressly forbids both state and federal governments from passing any "*ex post facto* law" that would criminalize conduct retroactively. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. The protection of the *Ex Post Facto* Clauses is based on the right to notice that is inherent in due process. *Marks v. United States*, 430 U.S. 188, 191 (1977). Thus, this Court has reasoned that "[i]f a state legislature is barred by the *Ex Post Facto* Clause" from enacting retroactive criminal liability, the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the courts from "achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

Similarly, "[t]he constitutional prohibition against vagueness does not disappear simply because the state law at issue originated in the courts rather than the legislature." *Haslip*, 111 S. Ct., at 1058 (O'Connor, J., dissenting). Moreover, the degree of scrutiny required by the vagueness doctrine varies with the severity of the penalty imposed. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Although

laws and judicial acts lacking punitive character are subject to less demanding review, *see, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), even non-punitive retroactive lawmaking is constitutionally disfavored. *See, e.g., United States Trust Co. v. State*, 431 U.S. 1 (1977) (retroactive lawmaking violated Contract Clause).

While punitive damages are not imposed after a criminal trial, they are, as this Court explained, "quasi-criminal." *Haslip*, 111 S. Ct., at 1044 (citation omitted). Having no fair warning that their conduct was actionable, Petitioners have been punished in the sum of $1,500,000 for venturing to estimate the future profitability of a fast food restaurant. This punishment is based on the blameworthiness of Petitioners and the purpose of achieving deterrence of similar conduct, the two objectives identified by this Court as the least likely to sustain the retroactive imposition of *civil* liability. *Turner Elkhorn*, 428 U.S., at 17-18. *A fortiori*, the retroactive imposition of quasi-criminal punishment cannot be sustained.

Due process requires at a minimum that Petitioners be given clear and prior notice of the standard of conduct they had to satisfy before they can be punished. The retroactive imposition of criminal punishment following a change in the law similar to the one that occurred here would amount to a *per se* violation of the Due Process Clause. Here, the retroactive imposition of quasi-criminal punishment is no less a violation of "the first essential of due process of law," *Roberts*, 468 U.S., at 629—adequate notice.

C. This Case Presents An Important, Recurring Issue Over Which Lower Courts Are Divided

Lower courts are divided over whether punitive damages may be imposed retroactively following imposition of a new legal standard. For example, in *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984), the New

Mexico Supreme Court recognized for the first time a cause of action in tort for retaliatory discharge but refused—as a matter of state law—to impose punitive damages on the defendant.

> Because this new cause of action imposes significant new duties, and because of reliance on the long-standing terminable-at-will rule, we hold that the new law should be given modified prospective application. Thus, we apply the law announced to the case before us, except as to punitive damages . . . .

699 P.2d, at 621-22 (citations omitted). The Minnesota Supreme Court has used the same reasoning. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 573 (Minn. 1987).

Similarly, the Supreme Court of Oregon refused to impose punitive damages in a case where it created a new cause of action, reasoning that "[i]f we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Nees v. Hocks*, 536 P.2d 512, 517 (Or. 1975). The Supreme Court of Illinois, following *Nees*, has held that "punitive damages should not be awarded where, as here, the cause of action forming the basis of the award is a novel one." *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978). Similarly, the Nevada Supreme Court and at least one federal district court have refused to impose punitive damages retroactively. *Hansen v. Harrah's*, 675 P.2d 394 (1984); *Michael v. National Sec. Fire & Casualty Co.*, 458 F. Supp. 128 (N.D. Miss. 1978).

In contrast, in *Peterson v. Superior Court*, 642 P.2d 1305 (Cal. 1982), the Supreme Court of California expressly rejected state and federal constitutional challenges to the retrospective allowance of punitive damages. Similarly, the Alaska Supreme Court has announced a new rule of law, while at the same time imposing punitive

damages and declining on state law grounds to give the new rule prospective punitive effect only. *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986). The Idaho Supreme Court has also affirmed an award of punitive damages in a case where it created a new rule of law. *Sliman v. Aluminum Co.*, 731 P.2d 1267 (Idaho 1986), *cert. denied*, 486 U.S. 1031 (1988).

The constitutional issue posed here—the aggressive retroactive expansion of civil tort liability coupled with the imposition of punitive damage awards—has been a matter of increasing concern to federal courts. *See Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1417 (5th Cir. 1990) (Jones, J., joined by Gee, Jolly and Smith, J.J., dissenting from denial of rehearing *en banc*), *cert. granted, judgment vacated and remanded*, 111 S. Ct. 1298 (1991), *appeal after remand*, 934 F.2d 1377 (5th Cir. 1991). There, as here, an activist state supreme court enlarged the scope of a tort and applied the new rules of conduct retroactively to both an award of compensatory damages and an award of punitive damages. Judge Jones persuasively argued that due process was violated by the imposition of punitive damages where the defendant failed to comply with a " 'clear requirement in Mississippi law' . . . two years before the 'clear requirement' was expressed by the Mississippi Supreme Court." 894 F.2d, at 1417.

The issue presented in this case has been before the Court on several occasions, but the Court has never reached it. The issue was before the Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), but it was unnecessary for the Court to reach it and the Court chose not to do so. The Court noted, however, that it was an "important issue[] which, in an appropriate setting, *must be resolved.*" 475 U.S., at 828-29 (emphasis added). More recently, Justice O'Connor, joined by Justice Scalia, stated:

> [A]ppellant contends that the Mississippi Supreme Court changed its standards for judging when an

> insurer may be liable for punitive damages and applied the new standard retroactively to this case. Appellant explains that it had no advance notice of what conduct could render it liable for punitive damages . . . .
>
> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case.

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment).

II. POST-VERDICT REVIEW OF THE PUNITIVE DAMAGE AWARD

A. The Lack Of Any Post-Verdict Review Of The Reasonableness Of The Punitive Damage Award Violates Due Process

While this case was in the lower courts, this Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), another Alabama case raising a due process challenge to a punitive damage award. There the Court recognized that, under certain circumstances, an award of punitive damages may "cross the line into the area of constitutional impropriety." 111 S. Ct., at 1046. In determining that the award in *Haslip* did not violate the Due Process Clause, the Court focused on three factors: the jury instructions, post-trial review of the award, and procedures for the Alabama Supreme Court to review the award.

The Court pointed out that in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the Alabama Supreme Court established procedures for trial courts to review punitive damage awards. *Hammond* requires the trial court to "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." 493 So. 2d, at 1379. The Alabama Supreme Court has set out seven

factors that are appropriate for the trial court to consider,[4] including, among others, " 'the culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' 'the impact on the parties,' and 'other factors, such as the impact on innocent third parties.' " *Haslip*, 111 S. Ct., at 1044 (citation omitted). This led the Court to conclude that the "*Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.*

In addition, the Court emphasized that the Alabama Supreme Court provides an additional check on the jury's discretion to award punitive damages. The Alabama Supreme Court first employs a comparative analysis and then applies the substantive standards it has developed for evaluating punitive awards. "In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " 111 S. Ct., at 1045 (citations omitted). In the Court's view, this feature "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)." 111 S. Ct., at 1045 n.10. The Court concluded that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct., at 1045.

The punitive damage award in *Haslip* was upheld by this Court because the defendant had the benefit of *all* of Alabama's procedural protections. The jury instructions were adequate. 111 S. Ct., at 1046. The trial court held a post-trial hearing and made the findings required by

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[4] *Green Oil v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989), and *Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371, 376-77 (Ala. 1989), augment the factors originally set out in *Hammond*.

Hammond. Id. Moreover, the Alabama Supreme Court reviewed the award and affirmed it. *Id.*

In this case, Petitioners plainly did not receive the post-trial review required by *Haslip.* After trial, Petitioners moved for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. The District Court denied that motion without any discussion of punitive damages (App. at 13a-16a). As the Court of Appeals concluded on identical facts in another case, "[c]learly this does not comply with *Hammond's* requirement to reflect in the record the reasons for refusing to interfere with the jury's verdict." *American Employers Ins. Co. v. Southern Seeding Serv., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991).

Moreover, *Haslip* emphasized that appellate review of the punitive damage award was an important "additional check on the jury's or trial court's discretion." 111 S. Ct., at 1045. Appellate post-verdict review "ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* Indeed, "post-verdict review by the Alabama Supreme Court has resulted in a reduction in punitive damages." *Id.* However, Petitioners received no appellate review of the reasonableness of the punitive damages awarded in this case. Despite being given two opportunities to do so, the Court of Appeals did not issue any opinion in this case.

There can be no doubt that Petitioners did not receive the due process protection of (1) a post-trial hearing and findings on the record, and (2) appellate review to ensure that the punitive damage award was "reasonable" and "rational." By failing to apply the *Hammond* factors and reflect their reasons for denial of the motions on the record, neither the District Court nor the Court of Appeals made any determination whether the punitive award was within the limits set by state law. Accordingly, if punitive damages are permitted at all in this case, the case must be remanded for consideration of the reasonableness of the award.

B. Federal Courts Are In Confusion Over How To Review Punitive Damage Awards

Like *Haslip*, this case is a due process challenge to an award of punitive damages by an Alabama jury. However, it differs from *Haslip* in that this is a federal, not a state, case. This Court has provided guidance as to the role of federal courts in reviewing a punitive damage award based on a state cause of action:

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse of discretion standard.

Browning-Ferris, 492 U.S., at 279.

Several courts of appeals have held that determination of whether a punitive damage award is excessive in a diversity case is a matter governed by state substantive law. *See Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanded for review of punitive damage award "applying the appropriate principles of Missouri law"); *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (same); *Southern Seeding*, 931 F.2d, at 1457 (Alabama diversity case; remanded to district court for application of *Hammond* factors).

Another court of appeals has concluded that "in order to comport with the due process requirements of the Fifth Amendment, post-trial and appellate review of punitive damage awards in the federal courts . . . based upon state statutes and common law, can no longer be conducted under Virginia's 'excessiveness' standard but must instead proceed under standards similar to those enunciated by the Alabama courts in *Hammond*, *Green Oil*, and *Central Alabama*." *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991). The Eighth Circuit took yet another tack: it remanded an Arkansas

diversity case for the district court to review the reasonableness of a punitive damage award under *both* Arkansas law *and* the factors used by Alabama courts that this Court approved in *Haslip*. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991).

Finally, another panel of the Fourth Circuit, relying primarily on that court's *en banc* decision in *Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.*, 938 F.2d 502 (4th Cir. 1991), has held that "[t]he legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by a federal district court." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). According to *Mattison*, while a federal district court must apply the substantive law of the state when instructing the jury on punitive damages, it must review the jury verdict under the standards established by Rules 50(b) and 59 of the Federal Rules of Civil Procedure, as well as the Seventh Amendment. "Because the reviews under Rules 50(b) and 59 are more deferential to jury verdicts than appears to be the process under the state law of Alabama and because the Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury . . . the guidance provided by the holding in *Haslip* is of limited assistance." *Id.*; *see also Hugo's Skateway*, 949 F.2d, at 1354 (Niemeyer, J., dissenting). Because a federal court "cannot substitute its judgment for that of the jury," its only remedy in the face of an excessive punitive damage award is to grant a new trial. *Mattison*, 947 F.2d, at 107-08. As *Mattison* recognizes, this leads to "the anomalous result that a decision on a claim for punitive damages could be significantly different depending on whether the case was tried in a federal court." *Id.* at 109.

The punitive damage award in this case received neither the post-verdict review of the trial court nor the appellate review mandated by *Haslip*. In the absence of intervention by this Court, the due process protection

mandated by *Haslip* will be illusory. The Court should, even if it upholds the retroactive imposition of punitive damages that Petitioners argue violates due process, grant certiorari to clarify the obligations of federal courts in reviewing punitive damage awards based on state law causes of action.

CONCLUSION

The issues presented by Petitioners are substantial and recurring. Punitive damages have been and will continue to be imposed by federal and state courts where no advance notice is given of the nature of the duty or the standard of conduct, despite federal constitutional guarantees. Moreover, the lower federal courts are confused over the standards that should govern the post-verdict review of punitive damage awards; at a minimum, this Court must make clear that the federal courts cannot shirk their duty to engage in meaningful post-verdict review of punitive damage awards. The petition should be granted and the case set for plenary consideration.

Respectfully submitted,

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July 6, 1992

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7838

D. C. Docket No. 88-0761-P

KITCHENS FOODS, INC.; MORGAN D. KITCHENS; BLAKELY M. KITCHENS; PAULINE H. KITCHENS; DOYLE KITCHENS,
Plaintiffs-Appellees,

versus

ARBY'S INC.; FRED BARTLIFF,
Defendants-Appellants,

KEN CLARK; FRANCHISE FINANCE CORP. OF AMERICA, INC., INSURED INCOME PROPERTIES, INC., A Delaware Limited Partnership, FFCA/IIP 1985 PROPERTY CO.,
Defendants.

Appeal from the United States District Court
for the Southern District of Alabama

(September 19, 1991)

Before ANDERSON, Circuit Judge, CLARK, Senior Circuit Judge and BROWN*, Senior District Judge.

PER CURIAM:

AFFIRMED. *See* Circuit Rule 36-1.

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* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

C.A. 88-0761-P-C

KITCHENS FOODS, INC., *et al.*,
Plaintiffs

vs.

ARBY'S, INC. and FRED BARTLIFF,
Defendants

ORDER AND DIRECTIONS TO ENTER JUDGMENT ON SPECIAL INTERROGATORIES TO THE JURY

On Tuesday, June 19, 1990, came the parties by and through their counsel of record and announced ready for trial. The witnesses and the jury were sworn, the jury having been previously selected on Monday, June 18, 1990.

Plaintiffs completed their presentation of their case on Friday, June 22, 1990 and the defendants filed a motion for directed verdict. Oral arguments on the defendants' motion for directed verdict were entertained and the motion was DENIED. Court recessed.

Court reconvened on Monday, June 25, 1990 and continued through Tuesday, June 26, 1990. Defendants completed their presentation of their case and filed a second motion for directed verdict which was also DENIED.

On Wednesday, June 27, 1990, closing arguments were made and the Court gave its charge to the jury and the jury began its deliberation.

On Thursday, June 28, 1990, the jury returned to deliberate. At 12:10 p.m. a verdict was reached on special interrogatories, which are attached and incorporated as part of this order, and which found and assessed compensatory and punitive damages for the plaintiffs, Kitchens Foods, Inc., and Doyle Kitchens, Pauline Kitchens, Blakely Kitchens and Morgan Kitchens, individually and against the defendants, Arby's Inc., and Fred Bartliff as set out therein. It was agreed by all counsel that the court would enter judgment pursuant to the jury's answers to the interrogatories.

It is ORDERED that judgment be entered accordingly.

DONE at Mobile, Alabama, this the 3d day of July, 1990.

/s/ Virgil Pittman
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

INTERROGATORIES TO THE JURY

I. (A) Have the plaintiffs established by a preponderance of the evidence that Fred Bartliff made material misrepresentations to the plaintiffs which the plaintiffs justifiably relied upon and which induced them to act?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to (B).

If your answer is "NO," please go to II.

(B) Have the plaintiffs established by a preponderance of the evidence that any material misrepresentations made by Fred Bartliff were the proximate cause of injury to the plaintiffs?

Answer:

(X) Yes ( ) No

Please go to II.

II. (A) Have the plaintiffs established by a preponderance of the evidence that the defendants fraudulently suppressed information defendants had a duty to disclose?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to (B).

If your answers to I(A) *or* I(B) *and* II(A) are "NO," please go to the end and foreperson sign; otherwise go to B.

(B) Have the plaintiffs established by a preponderance of the evidence that such fraudulently suppressed information by the defendants was a proximate cause of injury to the plaintiffs?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to III.

If your answer is "No" to I(A) *or* I(B) *and* II(B), please go to the end and foreperson sign.

III. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have discovered fraudulent misrepresentations on or before July 28, 1986?

Answer:

(X) Yes ( ) No

Please go to IV.

IV. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have dis-

covered such fraudulently suppressed facts the defendants had a duty to disclose on or before July 28, 1986?

Answer:

(X) Yes ( ) No

If your answers to III *and* IV were "NO," please go to the end and foreperson sign.

If your answer to either III *and/or* IV was "YES," please go to V.

V. (A) If your answers to questions I(A) *and* I(B) *and/or* II(A) *and* II(B) were "YES," fill in the following:

We assess compensatory damages against the defendants as follows:

(1)	Kitchen Foods, Inc.	$300,000.
(2)	The plaintiffs individually, to wit:	
	Doyle Kitchens	$20,750
	Pauline Kitchens	$20,750
	Blake Kitchens	$20,750
	Morgan Kitchens	$20,750

(B) (1).

We assess punitive damages:

(X) Yes ( ) No

If your answer is "YES," please go to (B) (2).

If your answer is "NO," please go to the end and foreperson sign.

(B) (2).

We assess punitive damages against the defendants in favor of Kitchens Foods, Inc. in the amount of $1.5 million.

We assess punitive damages against the defendants in favor of the individual plaintiffs Doyle, Pauline, Blake, and Morgan Kitchens in the amount of $1.5 million.

/s/ Gayron J. Finlay
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC. and FRED BARTLIFF,
Defendants.

JUDGMENT

Pursuant to an agreement between the attorneys for the parties, this judgment is entered pursuant to the jury's interrogatories filed the 28th day of June, 1990.

Judgment is hereby entered for the plaintiffs against the defendants Arby's, Inc. and Fred Bartliff, as follows:

1. For the plaintiff Kitchens Foods, Inc., compensatory damages in the amount of $300,000.00 (three hundred thousand dollars) and punitive damages in the amount of $1,500,000.00 (one million five hundred thousand dollars); and,

2. For the plaintiff Doyle Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars); for the plaintiff Pauline Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars); for the plaintiff Morgan Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars), and for the plaintiff Blakely Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars), totaling $83,000.00 (eighty-three thousand dol-

lars), and against the defendants Arby's, Inc. and Fred Bartliff, and

3. Punitive damages for the plaintiffs Doyle Kitchens, Pauline Kitchens, Morgan Kitchens, and Blakely Kitchens totaling $1,500,000.00 (one million five hundred thousand dollars).

The total amount of punitive damages for Kitchens Foods, Inc. and Doyle Kitchens, Pauline Kitchens, Morgan Kitchens, and Blakely Kitchens is $1,500,000.00 (one million five hundred thousand dollars). The punitive damages are not cumulative as to the respective plaintiffs.

Costs are taxed against the defendants.

DONE the 3rd day of July, 1990.

/s/ Virgil Pittman
Senior United States District Judge

[Judgment Entered on Docket July 5, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7838

KITCHENS FOODS, INC.; MORGAN D. KITCHENS; BLAKELY M. KITCHENS; PAULINE H. KITCHENS; DOYLE KITCHENS,
Plaintiffs-Appellees,

versus

ARBY'S INC.; FRED BARTLIFF,
Defendants-Appellants,

KEN CLARK; FRANCHISE FINANCE CORP. OF AMERICA, INC., INSURED INCOME PROPERTIES, INC., A Delaware Limited Partnership, FFCA/IIP 1985 PROPERTY CO.,
Defendants.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 19, 1991)

[Filed June 5, 1992]

Before: ANDERSON, Circuit Judge, CLARK, Senior Circuit Judge and BROWN*, Senior District Judge

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* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

December 23, 1991

MEMORANDUM TO ALL COUNSEL AND PARTIES:

Re: 90-7838—KITCHENS FOOD, INC. -vs- ARBY'S INC.

The Court has directed appellees to file, within twenty-one (21) days from the date of this memorandum, a response to the suggestion for rehearing en banc. Appellee is also directed to file a letter brief addressing the issue of whether appellants properly preserved for appeal their challenge to punitive damages on the basis of the retroactivity grounds, also within twenty-one (21) days. The appellant will then have fourteen (14) days to respond to the appellee's letter brief.

Sincerely,

MIGUEL J. CORTEZ
Clerk

By: /s/ Joanne Kobin
Deputy Clerk

C: Wesley Pipes
Thomas W. Queen
Michael L. Sturm
Michael A. Youngpeter
T. Julian Motes
Richard Bounds
Andrew T. Citrin

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

This case is before the court on defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The case was tried before a jury on June 19-27, 1990. On June 28, 1990, the jury returned a verdict in favor of the plaintiffs; Kitchen Foods Inc., Doyle Kitchens, Pauline Kitchens, Blake Kitchens and Morgan Kitchens, assessing damages against the defendants, Arby's Inc. and Fred Bartliff, in the amounts of $383,000.00 compensatory damages and $1,500,000.00 punitive damages. Judgment was entered by the court on July 3, 1990, and the defendants filed the above mentioned motion and a response has been filed by the plaintiffs. After reviewing the motion and briefs in support and opposition thereof, the court concludes that the defendants' motion is due to be denied.

It is well established in this circuit that on a motion for judgment notwithstanding the verdict

> the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motion[s], that is, evidence of such weight and quality that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion[s] should be denied, ... A mere scintilla of evidence is insufficient to present a question for the jury. The motion[s] for . . . judgment n. o. v. should not be decided by which side has the better of the case, nor should [it] be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v. Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969).[1] After considering all of the evidence, the court is of the opinion that the evidence produced during the trial is of such a nature that reasonable men might reach differing conclusions as to the verdict. Therefore, the defendants' motion for judgment notwithstanding the verdict is due to be denied.

On the defendants' motion for a new trial, the standard to be applied is whether the court

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[1] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The Eleventh Circuit, sitting *en banc*, adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

> believes the verdict rendered by the jury was contrary to the great weight of the evidence. "Although a trial judge cannot weigh the evidence when confronted with a motion [for judgment] notwithstanding the verdict, in a motion for a new trial the judge is free to weigh the evidence." *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982) (citing *King v. Exxon Co.*, 618 F.2d 1111, 1115 (5th Cir. 1980)). The trial court, however, must find the verdict contrary to the great, and not merely the greater, weight of the evidence. (citations omitted). Finally, when independently weighing the evidence, the trial court is to view not only that evidence favoring the jury verdict but evidence in favor of the moving party as well.

Williams v. City of Valdosta, 689 F. 2d 964, 973 (11th Cir. 1982). After reviewing and reweighing the evidence, the court is of the opinion that the jury's verdict is not against the great weight of the evidence. Additionally, the defendants asserted that the jury was improperly charged and that the jury verdict was excessive. After reviewing the charges which the defendants contended were improper, the court remains convinced that the charges were correct statements of the law applicable in Alabama. Furthermore, the jury's verdict is consistent with the evidence presented at trial as to the amount of damages awarded. Therefore, the defendants' motion for a new trial is due to be denied.

DONE this the 30th day of October, 1990.

/s/ Virgil Pittman
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

JUDGMENT

It is ORDERED, ADJUDGED and DECREED that the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is due to be and hereby is DENIED.

DONE this the 30th day of October, 1990.

/s/ Virgil Pittman
Senior United States District Judge

EXCERPTS FROM TRANSCRIPT OF TRIAL PROCEEDINGS

* * * *

[Testimony of Morgan Kitchens:]

[455] Q In particular, you received two separate offering circulars from Arby's; is that right?

A That's correct.

Q On April 4, 1985, Arby's sent to you a 1984 franchise offering circular; is that right?

A Yes, sir.

Q And the transmittal letter for that is Defendant's Exhibit 1, and the offering circular itself is Defendant's Exhibit 3?

A Are you asking me?

Q Would you like to look at them to confirm that's right?

A Yes, sir, I believe what you say, sir.

MR. BREEDLOVE: He accepted it.

BY MR. QUEEN:

Q I think we're ultimately going to need these. Wes, could you give him 1, 3, 6 and 7.

(Mr. Pipes complied.)

Q And then a little bit later when the 1985 offering circular became available, Arby's sent [456] that to you on May 15, 1985; right?

A That's correct.

Q And the cover letter transmitting the offering circular is Defendant's Exhibit 6, and the 1985 offering circular is Defendant's Exhibit 7; right?

A Yes, sir.

Q And you had both those offering circulars prior to Mr. Bartliff's visit to Gulf Shores; right?

A That is right.

Q I would like you to take a look, please, at the first offering circular that you received, which is Defendant's Exhibit 3. Do you have it there?

A Yes, sir.

Q The offering circular sets forth a great deal of information on a number of topics concerning what Arby's obligations are, what your obligations are and how this whole franchising process would proceed if you're interested; is that right?

A Yes, sir.

Q And among other things that are pertinent to some of the issues we've been discussing here so far, on page 8 of the offering circular there is a detailed statement of what kind of [457] costs you should expect to incur in land, building and equipment and other initial investment costs in an Arby's restaurant; right?

A That's correct.

Q And you were aware of these figures before Mr. Bartliff ever came to Gulf Shores?

A I don't recall any specific figures, but I did read the offering circular. I read through it.

Q And when you read the offering circular, that included page 8 with all this information about anticipated costs; right?

A I did read through it.

Q And you understood from that—since you lived in Gulf Shores, you understood that from that that the real estate costs, the real estate values in a resort community like Gulf Shores were off the scale in terms of normal land costs for a restaurant; right?

A Yes, sir.

Q Now, another thing that the offering circular mentioned was site selection procedures; is that right? Please look over on page 13. Do you have it there?

A Yes, sir, I do.

Q Toward the bottom of the page. And in that [458] paragraph right at the middle of the paragraph it says, doesn't it, "Franchiser does not undertake to

guarantee the suitability or success of the accepted site for the restaurant?

A Yes, sir.

Q And you read that and you understood that before Mr. Bartliff ever came to Gulf Shores?

A Yes, sir.

Q Now, turning on back to page 28 of the offering circular, there is a statement there with respect to projections of sales and earnings; right?

A Yes, sir.

Q Bottom of the page. And what it says to you is "Franchiser—that's Arby's; right?

A Yes, sir.

Q "Arby's does not give actual average projected or forecasted franchisee sales, profits or earnings to prospective franchisees;" right?

A Yes, that's what it says.

Q And you read that and understood that prior to the time that Mr. Bartliff ever came to Gulf Shores right?

A I never considered that statement to be in conflict with—

[459] Q Excuse me. You read it and understood it before he ever came; right?

A I did read it.

Q Well, you understood it?

A Yes, sir.

Q The franchise offering circular also gives you a computer printout that included the names, phone numbers and addresses of all of the other Arby's franchisees and restaurants in the state of Alabama at that time; right?

A Yes, sir.

Q It also provided you with information concerning the number of license agreements that were outstanding and that had been terminated in the three years prior; right?

A I believe that's in there.

* * * *

[464] Q Yes, sir. But it was a projection. It wasn't anything that was true or false. At the time it was a projection; right?

A Yes, sir.

Q And it was his opinion. Again, I'm not saying we agree with this, I just want to explore your story. It was a projection, it was an opinion, his opinion, Fred Bartliff's opinion about events in the future; right.

A It was a projection based on his knowledge of Arby's. Whether or not it was an opinion or not, I wouldn't—I wouldn't know if I could call it that. It was just a projection based on his knowledge.

Q As I say, it was an existing fact there wasn't any restaurant sitting there; right?

A No, sir, there wasn't.

Q So it wasn't a fact. It was his opinion about what might happen in the future?

A Yes, sir.

* * * *

[470] Q Now, let's focus back on the representation that you claim was made about your restaurant in Gulf Shores and the 10 to 18 percent net profit, that as we've gone through, was tied to the million dollar—so-called million dollar sales projection. Let's focus on that; okay?

A Okay.

Q Again, if it happened, it happened in May 1985 when it's a vacant lot; right?

A Yes, sir.

Q So, again, this net profit projection—excuse me, this net profit representation, if it was made, was a projection about some future event; right?

A Yes, sir.

Q And if it was made, it was, at most, Fred Bartliff's opinion about future events; right?

A Yes, sir.

* * * *

[Testimony of Doyle Kitchens:]

[844] Q So despite the fact that you acquired assets in excess of a million dollars, even you had had—I think it was a charter bus and car wash company, right, that had never made any money?

A I was a stockholder in it, yes, sir.

Q Well, now, let's pick up for a second here on the distinction that I think you were just alluding to and focus for a second on what either you or your sons say that Fred Bartliff said to you folks when he visited Gulf Shores.

And, again, as I have mentioned, I don't think I need to understand that we don't agree that these things weren't said. But I need to explore with you how this supposedly happened. And let's focus first on the claim about a million dollars in sales. Are you with me?

A Yes, sir.

Q Assuming that was said when Mr. Bartliff was there in Gulf Shores, obviously the restaurant wasn't opened; right?

A No.

Q I'm sorry, sir?

A No, sir.

Q What was to be the restaurant was a vacant lot that you folks looked at?

[845] A That's correct.

Q And so what level of sales there might or might not be on that vacant lot was—if it was said—was a projection about future events and what they might turn out to be; right?

A Right.

Q And what was said, if it was said, was Mr. Bartliff's opinion about how things might turn out in the future; right?

A That's correct.

Q Now, because nobody can see into the future, you understood that that was Mr. Bartliff's best assessment, his best guess about what happened; right?

A Yes, sir.

Q Now, let's shift our focus for a second from the claim about this alleged representation of a million dollars in sales and talk a little bit about the alleged representation concerning profits.

On your testimony, the only representation of profits, as I understand it, was that if there were a million dollars in sales at the restaurants, then there would be 10 to 18 percent profit; is that your claim?

A Yes, sir.

Q So with respect to that representation, if it were made, again, the restaurant wasn't opened; right?

[846] A No, sir.

Q So if the representation were made, what it was, at most, was Mr. Bartliff's projection about future profits; right?

A (No response.)

Q Yes or no, sir, please.

A I guess.

Q And what it was, if it was made, was Mr. Bartliff's opinion about future events; right?

A Right.

Q And as with the alleged sales representation, what it was, if it was made, was Mr. Bartliff's best assessment, his best guess, about what might happen in the future; right?

A Mr. Bartliff said that was a million dollar location if it was run right.

Q Well, sir, as we have just gone through, the restaurant wasn't built yet; right?

A That's correct.

Q So what it was was Mr. Bartliff's—if it was said—and that's the assumption I'm basing all these questions—if it was said, it was Mr. Bartliff's best assessment, his best guess, about what the future might hold at that location; right?

A That's correct.

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